

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
)	

COMMENTS OF FIBERTECH NETWORKS, LLC

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SUMMARY

Fibertech, a provider of dark fiber networks, has been a participant as a service provider in the E-rate program since 1999 and has had the opportunity to provide schools with the telecommunications services and Internet access they need to upgrade their communications facilities and provide their students with the advanced communications services that are critical to our educational institutions today. Many schools have come to rely on dark fiber services as an efficient, cost-effective solution for their communications needs. For these reasons, Fibertech submits these comments regarding the importance of reinstating dark fiber as an eligible service. Without dark fiber as an eligible service, schools and libraries have fewer choices in service providers, less flexibility in product offerings for both current and future advanced communications service needs, and face debilitating uncertainty with respect to existing and future service arrangements.

As explained in these comments, Fibertech urges the Commission to immediately reinstate dark fiber as a service eligible for E-rate funding. Nothing in the Act prohibits this action, nor would the FCC need to determine the regulatory classification of dark fiber before doing so. Rather, allowing schools and libraries to receive funding for dark fiber services under the E-rate program serves the goals of the E-rate program by providing school and libraries with a cost-effective, efficient solution to obtaining access to affordable telecommunications and Internet services.

Fibertech also supports the FCC's proposals to cap the upfront payments for WAN leases and to prorate payments of \$500,000 over 5 years, so long as the FCC provides E-rate participants with certainty in funding over the term of the multi-year contract.

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Fibertech Networks, LLC, (“Fibertech”), by its undersigned counsel, hereby submits these comments in response to the Federal Communications Commission’s (“Commission’s” or “FCC’s”) Second Further Notice of Proposed Rulemaking (“*FNPRM*”) issued in the above-referenced proceeding.¹

I. Introduction and Summary

Fibertech is a facilities-based telecommunications service provider that builds, leases and operates dark fiber networks in leading second and third-tier markets throughout the Northeast, Midwest and Mid-Atlantic States. Fibertech has designed and constructed high-capacity metro area networks, including fiber rings, to meet the advanced communications and broadband needs of telecommunications carriers, other business entities, and educational and governmental institutions. The company has posted significant sales, operations and financial results, including building more than \$75 million in network assets, selling over \$200 million in total

¹ Schools and Libraries Universal Service Support Mechanism, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 02-6, FCC 03-323 (rel. Dec. 23, 2003) (“*E-Rate FNPRM*”).

sales contracts, achieving a cash positive status in 2002 and 2003, and completion of the core network in its original 14 cities.

Fibertech's growth stems from a diversified customer base. Approximately 65% of 2003 sales were to enterprise customers, the company's business and educational accounts. The remaining 35% were sales to telecommunications carriers and wireless customers. In total, Fibertech serves six of the seven largest national long distance carriers, many CLECs, wireless providers, and more than 60 enterprise customers.

Fibertech has been a participant as a service provider in the E-rate program since 1999 and is an eligible vendor with an active Service Provider Identification Number ("SPIN"). Fibertech currently serves 23 school districts and is the winning bidder in 21 other districts, a number of which have applications pending for E-rate funding. As the winning bidder for multiple contracts, Fibertech has had the opportunity to provide schools with the telecommunications services and Internet access they need to upgrade their communications facilities and provide their students with the advanced communications services that are critical to our educational institutions today. These services have enabled schools to link online resources and databases, provide distance learning and shared applications, and obtain high-speed Internet connections, among other capabilities.

Educational institutions are an important part of Fibertech's customer base and business plan. As such, Fibertech has a vested interest in the efficiency and viability of the E-rate program. Fibertech is pleased to have the opportunity to participate in a program that is aimed at providing schools and libraries with affordable advanced communications services and looks forward to continuing to provide its services to these entities.

For these reasons, Fibertech submits these comments regarding the importance of reinstating dark fiber as an eligible service. Many schools have come to rely on dark fiber services as an efficient, cost-effective solution for their communications needs. Choice, flexibility, and certainty are important aspects of the E-rate program. The decision to eliminate dark fiber as an eligible service has undermined these key components of the E-rate program. Without dark fiber as an eligible service, schools and libraries have fewer choices in service providers, less flexibility in product offerings for both current and future advanced communications service needs, and face debilitating uncertainty with respect to existing and future service arrangements.

Nothing in the Communications Act of 1934 (“Act”) prohibits the Commission from reinstating dark fiber as an eligible service, nor does the Act require the Commission to determine a regulatory classification for dark fiber before reinstating it as an eligible service in the E-rate program. Moreover, given that dark fiber is an efficient and cost-effective means by which schools and libraries can obtain access to affordable telecommunications and Internet services, the funding of such services is clearly consistent with the public policy goals and purpose of the Act. In fact, dark fiber represents an important development in the fundamental goals of the 1996 Act as it represents an important investment in generating competitive alternative facilities. It is our view that without the development of a competitive infrastructure, telecommunications competition and its inherent benefits to consumers, including school districts, has little chance for long-term success.

Fibertech also supports the FCC’s efforts to impose additional restrictions on large upfront payments for Wide Area Network (“WAN”) services, so long as a corresponding level of

certainty in funding is provided to the applicants and service providers in recognition of the significant capital investments and resources typically involved in WAN leasing contracts.

II. Dark Fiber Is an Important Component of the E-rate Program and Should Be Reinstated as An Eligible Service.

Over the past several years, Fibertech has provided dark fiber services to a number of school districts under the E-rate program. It has been Fibertech's experience that dark fiber services primarily are used by school districts to connect schools within the district to the public switched telephone network or the Internet as part of a Wide Area Network. The availability of dark fiber services provides many benefits to schools, including, but not limited to, cost-savings and the flexibility to generate additional bandwidth over dark fiber networks, simply and easily as needed, to accommodate expanding telecommunications and Internet access demands. This technological advantage provides schools with an efficient means by which they can obtain immediate access to advanced services to meet the ever changing telecommunications and Internet services needs of their educational programs.

Prior to the recent changes in the eligible service list, many school districts determined that dark fiber services were the most cost-effective solution for obtaining telecommunications and Internet access services. Recognizing these benefits, SLD routinely granted E-rate funding to schools for the leasing of dark fiber services. As a result, for the last several years, many schools have come to rely on dark fiber networks to fulfill their telecommunications and Internet service needs. The abrupt policy change that removed dark fiber as a service eligible for E-rate funding has been a significant detriment to schools and libraries. Importantly, the change in eligibility status for dark fiber limits the service provider and communications service options available to schools and libraries to the detriment of program participants and the E-rate program

itself. Most of the lit services are provided only by a limited number of local exchange carriers. Moreover, as indicated above, dark fiber services give schools and libraries more flexibility to meet the changing bandwidth demands inherent in advanced communications services, along with more operational and financial control over these demands in the future.

In addition to limiting the availability of services and service providers, the decision to remove dark fiber as an eligible service has created tremendous uncertainty in the E-rate procurement process. Existing contracts, under which significant time, money and resources have already been devoted by schools and service providers alike, have been thrown into limbo with respect to the awarding of E-rate funding. Fibertech also has found that many schools have become hesitant to move forward with the procurement of wide area network services in general out of concern for unforeseeable changes in the E-rate eligibility status. This concern is intensified at the neediest and most dependent districts, typically in urban or rural areas. E-rate policies should not favor one technology over another, and the eligibility status of dark fiber services should not be suddenly changed to the detriment of schools and libraries that have come to rely on those services as an efficient, cost-effective means of obtaining telecommunications and Internet services.

As the Commission has previously indicated, an important goal of the program is to provide schools with flexibility in fulfilling their communications needs. Eliminating dark fiber from the eligible services list does not facilitate that goal, but instead hinders it. Schools will be discouraged from utilizing dark fiber services, even if dark fiber services are an efficient and cost-effective solution for a school's advanced communications needs. Such a result is contrary to the goals of the E-rate program because it decreases the options available to E-rate participants, and thereby, limits the ability of schools and libraries to provide advanced

communications services to their communities. Accordingly, Fibertech urges the Commission to reinstate dark fiber as an eligible service without delay so that participants in the E-rate program, and their students and communities, can continue to enjoy the efficiencies and benefits provided by dark fiber services.

III. Reinstating Dark Fiber as an Eligible Service is Consistent With Section 254(h) of the Act.

Section 254(h) of the Act articulates a goal of assisting schools and libraries to obtain advanced services but does not define the exact manner in which that goal must be achieved. The Commission is directed broadly to promulgate rules “to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.”² Furthermore, there is nothing in the legislative history of the Act that indicates that Congress intended to dictate the exact methods by which these institutions would be assisted in obtaining advanced services or intended to prohibit these institutions from obtaining such services by acquiring the necessary transmission equipment and the right to lease dark fiber capacity that would enable the efficient use of that equipment. Indeed, as explained above, the availability of dark fiber services to schools and libraries plays a significant role in providing these institutions with access to advanced communications services. Thus, permitting

² 47 U.S.C. §254(h)(2). The only limitations imposed by Congress are focused on (a) eliminating assistance to schools or libraries that, by virtue of their for-profit status, large endowment or other qualities are perceived as not needing the special assistance provided by this program and (b) preventing institutions from abusing the program by reselling the subsidized services received through the program. *Id.* §§ 254(h)(3),(4).

the use of dark fiber in the E-rate program is not only consistent with the policy goals of section 254(h), but also the broader public policy goals of the Act.³

The Commission can also reinstate dark fiber as an eligible service without determining the regulatory classification of dark fiber for purposes of the existing E-rate service categories and without resolving other unrelated issues that may exist regarding dark fiber in other regulatory contexts. The Act does not establish a prerequisite that the regulatory status of a service be determined before the service can be eligible for E-rate funding. The E-rate service categories of “telecommunications services,” “internet services,” and “internal connections” were created for administrative purposes and are not mandated by the Act.

Moreover, the dark fiber arrangements that will be eligible for funding should not be viewed as the services being funded, but rather as the method by which the advanced services will be obtained, including telecommunications, video and high-speed Internet services. Therefore, it is not necessary to determine the regulatory classification of dark fiber under the E-rate program in order to approve its use in an arrangement that delivers advanced communications services to qualified institutions. The key point is that the advanced services

³ The Commission has articulated a preference to encourage the development of facilities based competition. It is common knowledge that one of the great challenges to development of facilities based competition is the high capital cost of deploying fiber optic cables throughout local markets. It is also common knowledge that the lion’s share of the cost of deploying new cables is not in the cost of the cable itself, but in the labor, engineering and right-of-way costs attendant to any such project. To the extent that one company deploys a dark fiber network and makes fiber strands within that network available to multiple carriers, consumers can be benefited by vigorous competition that would not exist if each carrier had to cost justify the deployment of its own cable network. If the Commission permits schools and libraries to enter into dark fiber arrangements, it will result in additional users of fiber strands and will assist dark fiber network providers to be financially viable, which in turn will encourage the deployment of additional dark fiber to the benefit of competition generally.

that will be obtained through the dark fiber arrangement are qualified services that Section 254(h) seeks to enable these institutions to utilize. The dark fiber is an adjunct to the qualified service and its use should be classified as an acceptable method of delivery of the target service. Otherwise, a result that renders dark fiber ineligible for E-rate funding will serve only to deprive qualified institutions of an extremely beneficial and cost efficient method of obtaining advanced communications services.

The eligibility of dark fiber for E-rate funding also should not be dependent on whether the dark fiber provider contributes to the universal service fund ("USF"). Internet services provided to qualified institutions by third party service providers are eligible for funding through the E-rate program. Yet, a provider of such a service that specializes in delivering only that type of service is not required to contribute to USF, and the service it sells is still eligible for E-rate funding. Given that background, it would be inequitable to disqualify dark fiber arrangements from funding simply because the dark fiber provider does not provide services that are subject to USF contributions. Moreover, the parties that would be truly injured by such a policy would be the qualified institutions that the program is designed to help.

Even if the Commission deems it advisable to create a separate classification for dark fiber in order to make dark fiber arrangements eligible for funding, that could be done quite simply without resolving other unrelated issues that may exist regarding dark fiber in other regulatory contexts. Precedent exists for this in the area of unbundled network elements, where the Commission has required that ILECs make dark fiber loops and transport available as an

unbundled network element under stated circumstances.⁴ In that context the Commission has recognized that dark fiber is an essential tool in providing service, even though there may be an issue of whether it lacks the equipment operation/data movement element that is at the core of the statutory definition of telecommunications.

In sum, there is no legal or logical reason why dark fiber cannot be reinstated as eligible for E-rate funding on the same terms and conditions that applied previously. Dark fiber would be eligible for funding if (a) it is leased to obtain telecommunications or internet access services, (b) the applicant lights the fiber and its electronics to light the fiber are located solely at the eligible school or library, and (c) the applicant shows a direct and immediate use for transmission capability of the subject capital expenses. If the dark fiber is used as part of a WAN to obtain telecommunications or internet access services, the availability of funding would be subject to the requirements of section 54.518 of the Commission's rules, as was the case when dark fiber was an eligible service. Thus, SLD would continue to evaluate the dark fiber funding request, as it did before, to ensure that the schools were not purchasing or building wide area networks in contravention of section 54.518. Under this former process, schools and libraries benefited tremendously from the availability of dark fiber under the E-rate program. They, their students and their communities should be able to realize these benefits in the future as well.

⁴ See 47 C.F.R. § 51.319(a)(1) (which defines the local loop network element to include dark fiber); *see also UNE Remand Order*, 15 FCC Rcd 3696, 3772-73 n. 301 (1999).

IV. The FCC Should Streamline and Remove Uncertainty from WAN Application Process.

Fibertech agrees with the FCC's concerns that large up-front payments for services can be a drain on the universal service fund in a particular year. Thus, Fibertech supports FCC's proposal to limit up-front payments for the leasing of WANs to 25% of an applicant's entire funding request. Fibertech also supports the FCC's proposal to require up-front WAN payments of \$500,000 or more to be prorated over 5 years.⁵ However, due to the capital investment and resources involved in WAN leasing contracts, Fibertech urges the FCC to correspondingly remove uncertainty from the procurement process by providing assurances that funding will be provided for the term of the WAN contract. Specifically, instead of requiring schools and libraries to apply for approval of funding for each year of the term of a WAN contract, once a multi-year WAN contract has been approved by the SLD, a streamlined process should be in place for distribution of funding for subsequent funding years covered by the contract term. To address concerns the Commission may have about future funding commitments, a condition could be placed on the initial approval that a project may not be funded if, for some reason, the program funds are not available, or the program itself is in jeopardy.

Significantly, the Commission's goal should be to remove uncertainty from the procurement process given the significant capital investments and resources typically involved in a WAN lease. Otherwise, the uncertainty provides a disincentive for schools and libraries to select a WAN service, even though a WAN may be the most cost-effective solution for their communications needs. Again, this uncertainty is most pronounced in the neediest districts

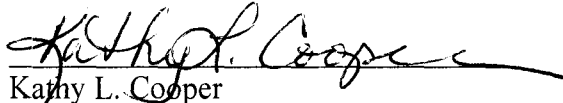
⁵ *E-Rate FNPRM* ¶¶ 74-75.

which struggle to make 3 or 5-year commitments to a WAN upgrade to support their programs when there is uncertainty surrounding reimbursement in future years. Fibertech has several current instances where financially strapped districts will be forced to stay on inadequate T-1 networks instead of upgrading to 100 mb networks at marginal increased costs. We feel that this situation is a disservice particularly to city and rural school districts. Indeed, the purpose of the program is not served by arbitrarily limiting the choices of the schools and libraries, particularly when many schools and libraries have determined that WANs are a critical infrastructure for their educational networks and a cost-effective way for them to obtain access to telecommunications and Internet services.

V. Conclusion

For the forgoing reasons, Fibertech urges the Commission to immediately reinstate dark fiber as a service eligible for E-rate funding. Nothing in the Act prohibits this action, nor would the FCC need to determine the regulatory classification of dark fiber before doing so. Rather, allowing schools and libraries to receive funding for dark fiber services under the E-rate program serves the goals of the E-rate program by providing school and libraries with a cost-effective, efficient solution to obtaining access to affordable telecommunications and Internet services. Fibertech also supports the FCC's proposals to cap the upfront payments for WAN leases and to prorate payments of \$500,000 over 5 years, so long as the FCC provides E-rate participants with certainty in funding over the term of the multi-year contract.

Respectfully submitted,


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Date: March 11, 2004

CERTIFICATE OF SERVICE

I, Susie Gustavson, hereby certify that on this 11th day of March, 2004, a true and correct copy of the foregoing *Comments of Fibertech Networks, LLC in CC Docket No. 02-06* was sent by overnight courier to the following:

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A handwritten signature in black ink, appearing to read "Susie Gustavson", with a long, sweeping horizontal line extending to the right.

Susie Gustavson
Swidler Berlin Shereff Friedman, LLP